No. 12273

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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SOUTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION, LTD., a non-profit corporation, etc., *et al.*,

*Appellants,*

*vs.*

RETAIL CLERKS UNION, LOCAL No. 770, an unincorporated association, etc., *et al.*,

*Appellees.*

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## APPELLANTS' REPLY BRIEF ON APPEAL.

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## TOPICAL INDEX

PAGE

Recapitulation of the facts ..... 1

Argument ..... 3

I.

The complaint in this action is not founded on the claim of unfair labor practices and such issues are not before the court ..... 3

II.

Appellants do not misquote or misstate the cases referred to by appellees in appellees' brief ..... 7

III.

The complaint and brief of appellants are not at variance ..... 9

IV.

The Federal Declaratory Judgment Act is applicable to the situation and controversy in issue ..... 11

V.

The elements of federal jurisdiction have been met by appellants ..... 14

Conclusion ..... 16

## TABLE OF AUTHORITIES CITED

### Cases


PAGE

Amazon Cotton Mill Company v. Textile Workers of America, 167 F. 2d 183 ..... 5, 16

Haleston Drug Stores, Inc., 82 N. L. R. B. 148 ..... 9

International Union U. A. W.-A. F. L., Local 232 v. Werb, C. C. H., 16 Labor Cases, par. 64,992 ..... 7

Kariher's Petition, 284 Pa. 455, 131 Atl. 265 ..... 13

Rice & Holman v. United Electrical Workers, 16 C. C. H. Labor Cases, par. 65087 ..... 7

Thomson v. Gaskill, 62 S. Ct. 673 ..... 14, 15


### Statutes


Labor Management Relations Act of 1947, Sec. 2(12) ..... 16, 17

National Labor Relations Act, Sec. 8(a)(5) ..... 5

National Labor Relations Act, Sec. 303(a)(b) ..... 8, 13


### Textbooks


Borchard, Declaratory Judgments, p. 57 ..... 12

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## APPELLANTS' REPLY BRIEF ON APPEAL.

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### Recapitulation of the Facts.

Were it not for the misguided attempt of the appellees to mislead the Court brought about by a failure to comprehend the facts and issues in this action, appellants would not indulge the Court's time in this restatement of the facts and issues. Out of respect to the knowledge and capability they presuppose in the counsel for the appellees, such misinterpretation could more probably be an assumption of deliberateness as opposed to the conclusion that they have failed to understand the issues of this case.

Again and again counsel for the appellees refer to this action as one based upon a complaint for relief against unfair labor practices. The opening reference is made in appellees' brief at pages two (2) and three (3), and this

fallacious thought runs throughout the brief and is made in too many instances for appellants to name each instance. Appellees refer to Paragraphs XVIII, XIX, and XXIII of the complaint on file in the action as definitely alleging the commission of unfair labor practices. The Court's attention is called to the wording of these paragraphs where it is shown that appellants have merely set out what appellees threaten to do, have repeatedly stated that they will do and have a right to do, and what the results of such a course of conduct would be. Appellants have alleged no unfair labor practices within the scope of the amended National Labor Relations Act, nor is this complaint based on any such allegations even by innuendo.

To the contrary, appellants have shown that a controversy exists within the ambit of the Federal Declaratory Relief Act, that the facts constituting such controversy are not within the power of the National Labor Relations Board to hear on the basis of repeated Board decisions, and that such a controversy existing, appellants have shown jurisdiction within the Federal Courts to set the controversy at rest before it reaches the stage of arbitrary illegal action by either party, and have asked for a declaration of rights by this Court. That is all that is embodied in the complaint, that is all that is argued in Appellants' Opening Brief, and that is all that will be argued in this brief other than a short rebuttal to the fallacious arguments of opposing counsel and a showing of the attempt of appellees to lead this Court from the real and vital issues before the Court.

## ARGUMENT.

### I.

### The Complaint in This Action Is Not Founded on the Claim of Unfair Labor Practices and Such Issues Are Not Before the Court.

Counsel for the appellees have attempted, by sarcasm on the one hand, and a slighting of the real issues on the other, to lead the Court astray and to "brush aside" the real issues in the action. Appellees have repeatedly stated that appellants have confused the issues, and that while the complaint is actually based on charges of unfair labor practices, the argument is made on other grounds. Any competent reading of the complaint and of Appellants' Opening Brief shows the contrary. A brief recapitulation of the facts here will show the fallacy in appellees' argument.

Contracts have been repeatedly presented to the appellant Drug Store owners with the statements that unless such store owners sign such contracts calling for use of appellee unions' members in such stores, economical and physical force will be applied to force such signing. Appellees have not been certified by the National Labor Relations Board as qualified representatives of such employees, nor can they be so certified, having failed to file the necessary affidavits with the Board. As the Court can readily see, the signing of such contracts would have the effect of forcing the employees in such drug stores into the appellee unions against their wills, AND WOULD HAVE THE EFFECT OF UNITING DIFFERENT UNITS OF LABOR IN ONE LABOR ORGANIZATION, TO WIT: PROFESSIONAL AND NON-PROFESSIONAL EMPLOYEES. These employees have expressed their unwillingness to being forced into

any such union, or any union, against their will, as witness their joining in this action.

Obviously the presentation of the contract involved here in and of itself is not an unfair labor practice of which the Board would take cognizance, nor would the threat of economic action itself constitute an unfair labor practice of which it can be said that the Board would take cognizance. If the Board would take cognizance of any overt act to punish a union for indulging in an unfair labor practice, there is nothing in the situation which makes it an unfair labor practice, due regard being given to the obvious; namely, that the Board will not concern itself with the unfair labor practices indulged in against a small business man. (The Board will not concern itself with the small business man because his problem in and of itself will not affect the national scene. This is contrary to the opinion of the Board's counsel that if commerce is present, there is no discretion. In other words, these acts of presenting the contract and the making of threats instead of showing jurisdiction before the Board do nothing more than show the necessity for Declaratory Relief. (Borchard, p. 57.)) Furthermore, the controversy for which declaratory relief is sought covering the situation with reference to the employee plaintiffs is actually outside that portion of the Act which covers the jurisdiction of the Board. In other words, when does an unfair labor practice as defined in the Act become an unfair labor practice, or contrariwise, when does an unfair labor practice cease to become an unfair labor practice?

The complaint, then, sums up to this: It is a request for a declaration of rights by store owners and employees, as to whether or not the appellee unions have any right

under the National Labor Relations Act to force the employer, or any group of employers, to in turn force his employees into any union against their will. It is readily seen that no charge of unfair labor practices is presented, that no such charge is argued, and that appellees' argument is a deliberate fallacy designed to mislead this Honorable Court, and an attempt to force a petition to the National Labor Relations Board which would be denied, no jurisdiction residing in that panel at the present time.

Appellants do not deny that many decisions have held that exclusive jurisdiction to hear charges of unfair labor practices resides in the Labor Board where such unfair labor practices exist. Appellees rely greatly on the case of *Amazon Cotton Mill Company v. Textile Workers of America,* C. C. A. 4th, 1948, 167 F. 2d 183, to sustain their position. Appellants have no argument with the decision in that action, but call this pertinent fact to the Court's attention: In the *Amazon* case, the charge was based on AN ACTUAL UNFAIR LABOR PRACTICE, TO-WIT: THE REFUSAL OF THE EMPLOYER TO BARGAIN WITH THE DULY QUALIFIED REPRESENTATIVE OF HIS EMPLOYEES. (Amended National Labor Relations Act, Sec. 8(a)(5).) In the above cited case we have a much different situation from the one in this action, a case there being presented where jurisdiction actually resided in the Board. In that case the charge fell within an enumerated unfair labor practice of the Act. And as pointed out by appellants in their opening brief (p. 8), the forcing of the employees into a union not of their own choosing constitutes an unfair labor practice BY THE EMPLOYER, but the coercion is indirectly applied by the union. Does the Act constitute this an unfair labor practice by the union, and thus can any charge at all be filed by the employer and employee

against the coercing union? The appellants contend "No" —do the appellees by their argument here contend "Yes"? Then a declaratory judgment is necessary, particularly when we consider the likelihood of the Board's holding that it has discretion to refuse to act, regardless of commerce or jurisdiction. The result is that the acts of the appellees in this instance do not come within the enumerated acts constituing unfair labor practices by a labor union set out in the amended Labor Relations Act, Section 8(b), and as of this date no overt act has been committed, the appellees confining themselves to threats. However, the contracts have in fact been presented, and the threats complained of have been in fact made. The controversy still exists, and will continue to exist until put at rest by this forum, which is the only competent forum to determine the controversy until damages have accrued, at which time a suit for coercive relief may be filed. Appellees say in effect that though they have presented the contracts, and have made the threats, and have in the past continued such threats until actual unfair labor practices exist, they do not intend to do so in this instance, and that appellants bring this action on hypothetical facts. Appellants repeat, the contracts have not been called for as a withdrawal, the threats have not been withdrawn, but to the contrary, other contracts have been presented to other stores and store owners and new threats of economic and physical coercion have been made. Appellants cannot ascribe to the "holier than thou" attitude now assumed by these appellees in view of their actions and the controversy continues to exist, the contracts having once been presented. Rather than being evidences of unfair labor practices, the continuing course of conduct more persuasively shows the continuance of the controversy and the necessity for declaratory relief.

## II.

## Appellants Do NOT Misquote or Misstate the Cases Referred to by Appellees in Appellees' Brief.

To further mislead the Court, appellees have resorted to accusations to the effect that counsel for the appellants misstate and misquote certain cited cases. In view of the holding of these cases, the Court will certainly not be led astray. Appellees refer in particular to the cases of *Rice & Holman v. United Electrical Workers,* 16 C. C. H. Labor Cases, Par. 65087, and to *Int'l. Union U. A. W.-A. F. L., Local 232, v. Werb,* C. C. H. 16 Labor Cases, 64,992. In the *Rice & Holman* case, appellees attempt to distinguish it on its facts, when in fact the case holds as stated by the appellants. Appellants herewith set forth language from this decision:

> "The present suit is for protection of plaintiff's property and personal rights in nowise dependent upon the labor contract between the parties, and it invokes the court's *inherent jurisdiction.*—There is also no force to defendants' contention that the complaint lacks equity because adequate relief may be had at law, or before or through the National Labor Relations Board. Damages at law are not equivalent to equitable personal relief. Plaintiffs cannot obtain such equitable relief from said Board in any event, nor even from the federal courts except at the suit of the Board." (Emphasis ours.)
>
> *Rice & Holman v. United Electrical Workers,* 16 C. C. H. Labor Cases, Par. 65,087.

Now as before stated by appellants, this case was not originally cited to show that jurisdiction was in another than the Board where unfair labor practices are charged. It was and is cited to show that in fact there is no relief available to appellants before the Board, no unfair labor

practices having been committed. But appellants are of the opinion that this case should also be cited to the effect *that even though unfair labor practices are being committed, there may be a remedy other than before the Board in which appellees allege exclusive jurisdiction.* The language of the decision allows of no other construction, and the case has not been reversed. The Wisconsin case cited above is only a reiteration that no adequate relief, in fact *no* relief, exists before the Board and that therefore the administrative remedy available to the appellants has in fact been exhausted, that in fact no such administrative remedy ever existed.

In the face of the National Labor Relations Act, Section 303(a)(b), appellees cannot seriously contend that the individual employee does not have an action for damages against any employer who forces such an employee to either quit his employment or to join some labor organization against his will by the signing of a labor contract for employment of only union members when such union has not been certified as representative of such an employee, and could not be so certified. The right of the employee to work is a vested property interest and one which he has an inherent as well as a congressionally given right to protect. In light of this certain liability to be incurred by appellant store owners if such labor contract is signed, appellees cannot contend with serious thought that a controversy does not exist in this instance, and one which the National Labor Relations Board has no power to hear or determine. Such determination can be given only by the Federal District Courts, as it is the property right of the employee which is sought to be protected and the Board has no jurisdiction over this right of the employee. Appellants seek merely to avoid liability to their employees and prosecution by the Board alike.

## III.

## The Complaint and Brief of Appellants Are Not at Variance.

Having shown that there is no charge of unfair labor practices, but merely the charge that appellees try to force appellants into the commission of unfair labor practices, appellants need spend little time on this alleged confusion of the appellees. Any confusion of appellees is by deliberation and not as a result of the pleadings and brief of appellants. The citing of the "small business" cases by appellants only show that refusal of the Court to take jurisdiction here will result in a futile act, and one which will avail neither the Court, the Board, nor the parties of any benefit. The parties plaintiff in this action are much analogous to the parties in the cases cited in Appellants' Opening Brief at pages eight (8) and nine (9) and appellants are but led to believe that the decision of the Board would be the same as in those cases, *if in fact it were found by this Court that unfair labor practices had already been committed in this instance.* In addition to the cases cited in Appellants' Opening Brief, appellants add the case of *Haleston Drug Stores, Inc.,* 82 N. L. R. B. 148. As in the prior "small business" cases the Board denied relief to the petitioning employer, said request for relief being based on charges of unfair labor practices, finding that while the employer may be engaged in commerce, it did not care to exercise its discretion to bother with the case due to its small effect on commerce. Thus we find that while such employers are engaged in commerce, and are subject to the terms of the National Labor Relations Act, the Board has continuously refused to take jurisdiction, throwing the petitioning employer right back on the courts for his relief. Appellants seek, then, to point out to the Court that it would be but a futile and impotent act to

send appellants before the Board, on this ground alone, as it must in the final analysis hear the action. Thus, even if it could be said that unfair labor practices exist in this controversy within the scope of the Act and previous Board decisions, it has never been the policy of the Court to demand a futile and useless act of any petitioner, and the futility of appeal to the Board is apparent in this case upon the basis of their alleged discretion to take or not to take jurisdiction.

BOARD DECISIONS EXERCISING DISCRETION IN THE BOARD OVERRULES THE INTENTION OF CONGRESS OR REDUCES THE BOARD'S JURISDICTION FURTHER NECESSITATING THE GRANTING OF DECLARATORY RELIEF.

It is a strange travesty upon federal justice when a Board can so circumscribe its own duty to enforce a federal statute which seeks to preempt the field of labor management relations before the law so that a small business man's problems must go begging without a judicial forum for a remedy which the law purports to grant him. The effect of his labor relations here is more direct than is true with much larger businesses. Many of the important drugs —miracle drugs—are shipped direct to him from outside the state by common carriers which cannot even come to rest on appellants' shelves if a picket line surrounds his store. A substantial amount of such items come direct.

The absurdity of the Board's position has no precedent or parallel. There was a practice of hand-picking cases by the Board several years ago because Congress cut down on its appropriations. How unfortunate a tragedy there would be if Senior Judge Paul McCormick of the District Court of the Southern District had given up his fight for more District Court judges. The analogy is the same. Hence it is with poor grace for appellees to so argue that it is an unfair labor practice and then further contend that

appellants are outside the pale and hence not even entitled to a declaration of their rights and obligations under the statute. How easy to eliminate the expenses of the Board if it were judicially determined that:

(1) It is unlawful for the Union to coerce an employer to in turn coerce a professional employee into a union not of his own choosing.

(2) It is unlawful for the Union to demand a union shop agreement without an election or certification.

(3) It is necessary for the Board to carry through its jurisdiction if acts actually constitute a commission of an unfair labor practice.

## IV.

## The Federal Declaratory Judgments Act Is Applicable to the Situation and Controversy in Issue.

Appellees have spent some portion of their brief in contention that appellants present this case on hypothetical and contingent facts; that is, facts which may come into existence in the future, but which do not exist at the present. Appellants wonder if appellees consider the presentation of the contracts in question and the demands made by the presentors of such contracts are to be considered as acts which may happen in the future. Appellants are more prone to consider these acts as present and existing facts. Appellants also wonder if appellees consider the difference in construction of the National Labor Relations Act which has been taken by the parties to this action is a difference which is only contingent rather than present and existing. Obviously, this portion of the appellees' brief is the *grasping at straws* of which they accuse appellants. To clarify appellants' position, appellants would like to cite from the

same authority used by appellees, to-wit: Borchard, Declaratory Judgments, page 56. Now appellants do not deny that a contingent and hypothetical fact situation is not a proper fact situation for declaratory relief. Appellees have set forth nothing to show that this is in fact such a hypothetical situation, but to the contrary have taken the position that it is such a situation, and cited cases to show that if the fact situation is as they have assumed it to be, jurisdiction should not be taken. Appellants submit that these facts do not show such a hypothetical situation, but to the contrary show a justiciable controversy within the definition given by Mr. Borchard, who could perhaps be called the father of the Declaratory Judgments Act, to-wit:

> "When are the facts contingent? That is not always easy to determine. The Pennsylvania Supreme Court in an exhaustive opinion which has been followed extensively, laid down the rule that the Court must be *satisfied that an actual controversy, or the ripening seeds of one, exists between parties, all of whom are sui juris and before the court, and that the declaration sought will be a practical help in ending the controversy.* By 'ripening seeds' the court meant, not that sufficient accrued facts may be dispensed with, but that a dispute may be tried at its inception before it has accumulated the asperity, distemper, animosity, passion, and violence of the full-blown battle which looms ahead. *It describes a state of facts indicating 'imminent' and 'inevitable' litigation, provided the issue is not settled and stabilized by a tranquilizing declaration."* (Emphasis ours.)
>
> Borchard, Declaratory Judgments, page 57.

It is but interesting to note that the appellees have apparently not indulged themselves in reading any of the ad-

mirable work of Mr. Borchard other than that portion which will support the assumption they would like to impose upon this Honorable Court. The Pennsylvania decision cited by Mr. Borchard is the case of *"Kariher's Petition,"* 284 Pa. 455, 471; 131 Atl. 265, 271 (1925), and while not binding upon this Court, has been widely followed as indicated by Mr. Borchard.

Appellants respectfully submit that having shown no unfair labor practices to exist in this instance, and thus showing no jurisdiction in the Board, the jurisdiction of the Court is not being extended when this Court takes jurisdiction under the Declaratory Judgments Act and declares the rights of the parties to this action upon the controversy presented, and appellants call the Court's attention again to the cases cited by them on pages 16, 17, 18, 19, 20, 21, 22, and 23 of Appellants' Opening Brief.

The Court's attention is also again called to page 20 of Appellants' Opening Brief where appellants have shown that if appellees are successful in forcing appellants into violation of the Labor Act, the appellant store owners then become liable for damages to the respective employees who are injured by force of such violation, AND THAT THE PROPER COURT FOR THE TRIAL OF SUCH LIABILITY IS THE FEDERAL DISTRICT COURT. (National Labor Relations Act, Sec. 303, (a) and (b).) Appellants respectfully submit that the force of this provision is great and that due consideration should be given to it. If the appellants are liable before this Court for violation of the Act, WHAT OTHER FORUM MAY DECIDE THE APPELLANTS' RIGHTS UNDER THE ACT? It is respectfully submitted that no other forum could so decide and that appellants are for this reason, if for no other, properly before the Federal Courts. The Board has nothing to do with this phase of the Act, if jurisdiction is otherwise in Federal District Court.

## V.

## The Elements of Federal Jurisdiction Have Been Met by Appellants.

Appellees cite several cases under Paragraph VIII of their brief (pp. 19-20) in an effort to show that the jurisdictional requirements of the Federal Courts have not been met. With the exception of the case of *Thomson v. Gaskill,* the validity of the cases are dependent on the assumption which the appellees have indulged in all through their brief, to-wit: that this action only concerns hypothetical facts and figures. Thus appellants will concern themselves only with this one case.

Appellees have indulged themselves in this statement at page 19 of their brief: "The amount in controversy must be measured by the pecuniary consequence to either party to an action. (*Thomson v. Gaskill,* 62 Sup. Ct. 673.)" Now it is apparent to appellants, and we believe to this Court, that appellees have either neglected to read the entire case cited above, or have deliberately misconstrued the decision. Citing from that decision, we find that the opinion by Justice Frankfurter actually holds this:

> "Upon the defendants' motion to dismiss the cause for want of jurisdiction, the District Court held that the pleadings and supporting affidavits established that the amount in controversy as to any one plaintiff does not amount to as much as $3,000.00, *and that the nature of the suit was not such as to permit aggregation of the claims of all the plaintiffs.* . . . The Circuit Court of Appeals reversed the dismissal. . . . Since the record does not contain the various

agreements upon which the plaintiffs' action is founded, there is no basis for determining whether this is a suit 'in which several plaintiffs, *having a common undivided interest,* unite to enforce a single title or right, *and in which it is enough that their interests collectively equal the* jurisdictional amount.'" (Emphasis added.)

*Thomson v. Gaskill,* 315 U. S. 442, 62 Sup. Ct. 673.

Now it is apparent that the above decision concerns a case where several plaintiffs have joined whose interests are not common and united, but for purpose of settling litigation in one suit, an absolutely contrary situation than that which appears here. Justice Frankfurter has in fact held that in a situation like that of appellants, the entire amount in controversy, constituting an aggregation of any and all individual amounts and injuries claimed, is the jurisdictional amount with which the Court is concerned. Appellants' citation at page 27 of their Opening Brief is but sustaining authority for this position and for appellants' position here.

Appellees' further argument that there is no equity jurisdiction in the situation herein presented is but facetious and without force and is based entirely on the fact that they *assume* an adequate remedy at law to exist for appellants. Appellants have clearly shown that not only is there lacking an adequate remedy at law, *there is in fact no remedy at law.*

## Conclusion.

Appellees have based their entire argument on the deliberate fallacy that appellants bring their action based upon unfair labor practices, and further assume that their assumption is correct and that appellants have a remedy before the National Labor Relations Board. Appellees rely heavily upon the *Amazon Cotton Mills* case, the *Gerry* case, and the *DeSilva* case, all of which appellants have shown are not in point for the purposes for which they have been cited. Appellants have clearly shown that there is no adequate remedy at law, that there is in fact NO remedy before the Board, that the sending of the appellants before the Board by this Court on any construction of the facts would be but to do a futile and impotent act and that appellants would be thrown right back before this honorable forum, that the complaint is clearly within the ambit of the Federal Declaratory Judgments Act and within the jurisdiction of the Federal Courts. All jurisdictional requirements have been met. On the basis of the National Labor Relations Act as it now exists the only relief for these appellants is before the Federal Courts. Any denial of such relief would be to say to these appellants that this Court recognizes that there may exist many wrongs for which the Courts offer no remedy, a statement which this Court cannot be prepared to make.

Appellants respectfully submit that jurisdiction in this forum has been decisively shown. Hence this Court can without further ado set the issues herein at rest by ruling as follows:

(1) That pharmacists in all of the drug stores who are represented in this action are professional employees within the meaning of Section 2(12) of the Labor Management Relations Act of 1947;

(2) That student pharmacists in all of the drug stores represented in this action are professional employees within the meaning of Section 2(12) of the Labor Management Relations Act of 1947;

(3) That such professional employees are protected in their right to choose any representative they may select to represent them in collective bargaining, and that coercion of the employer by the union to in turn coerce the employee in question into any labor organization is an unfair labor practice by the coercing labor union;

(4) That any labor agreement entered into by an employer with a labor organization which has not been and cannot be certified by the National Labor Relations Board as the legitimate bargaining agent of the employees concerned is necessarily invalid and void in its entirety, and that any validity given by employers to such a contract may render the appellant employers liable in damages to appellant employees and others similarly situated.

J. Wesley Cupp,

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